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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HUGO ERNESTO DELGADO,

Defendant and Appellant.

D069682

(Super. Ct. No. SCD263413)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed in part, reversed in part, and remanded with directions.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

The San Diego County District Attorney charged Hugo Ernesto Delgado¹ in an amended information with two felonies: (1) battery upon Felipe Hernandez causing serious bodily injury (count 1: Pen. Code,² § 243, subd. (d)), and (2) assault upon Hernandez by means of force likely to produce great bodily injury (count 2: § 245, subd. (a)(4)). The amended information also alleged that the charged crimes were serious felonies because Delgado personally inflicted great bodily injury on Hernandez when he committed the offenses (§ 1192.7, subd. (c)(8)), and because Delgado personally inflicted great bodily injury on Hernandez (§ 12022.7, subd. (a)) when he committed the assault.

The jury found Delgado guilty of battery causing serious bodily injury as charged in count 1 and not guilty of felony assault by means of force likely to cause great bodily injury (count 2). However, the jury found Delgado guilty of the count 2 lesser included misdemeanor offense of simple assault (§ 240).

On January 5, 2016, the court sentenced Delgado to the middle term of three years in state prison for his count 1 conviction and to a concurrent term of time served (288 days) for his count 2 conviction of misdemeanor assault. The court imposed a victim restitution fine under section 1202.4, subdivision (b) (hereafter section 1202.4(b)), in the amount of \$1,800. The court also imposed, but suspended, a parole revocation restitution fine in the same amount under section 1202.45.

¹ Delgado testified at trial and identified himself as Hugo Ernesto Delgado Jimenez.

² All further statutory references are to the Penal Code.

Delgado appeals on three grounds. First, he contends his count 2 conviction of misdemeanor simple assault must be reversed because simple assault is a lesser included offense of his count 1 offense (battery causing serious bodily injury) and, thus, "because both counts relate to the same incident, [he] could only suffer a conviction for the greater offense." Second, he alternatively contends the court should have stayed under section 654³ the execution of the concurrent time-served sentence it imposed for his count 2 assault conviction because the battery (count 1) and the assault were both part of an indivisible course of conduct. Last, he contends that, because his count 2 misdemeanor simple assault conviction must be reversed, the \$1,800 restitution fine the court imposed under section 1202.4(b) must be reduced by half to \$900 because "the fine was presumably based on two convictions and not one."

We conclude Delgado's count 2 simple assault conviction and the concurrent time-served sentence imposed for that conviction must be reversed because he cannot lawfully be convicted of both the greater offense of battery causing serious bodily injury (count 1) and simple assault. We also conclude Delgado forfeited his claim that the \$1,800 restitution fine imposed under section 1202.4(b) is excessive.

³ Section 654, subdivision (a) provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 "precludes multiple punishment for a single act or omission, or an indivisible course of conduct." (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) If a defendant suffers two convictions and punishment for one is barred by section 654, "that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed." (*Deloza*, at p. 592.)

FACTUAL BACKGROUND

A. The People's Case

The victim in this case, Felipe Hernandez, testified that on August 15, 2015, following a traffic incident, Delgado confronted him in the parking lot of the Wyndham hotel on Harbor Drive in downtown San Diego where Hernandez worked. Hernandez testified he drove into the hotel parking lot and was looking for a parking space when Delgado walked in front of his car, forcing him to stop, and then came around to the driver's-side window where he angrily berated Hernandez, calling him a "fuck son-of-a-bitch" and blaming him for the traffic incident.

Hernandez, who was wearing his seatbelt and holding the steering wheel with both hands, told Delgado he should have been more cautious and then, with a dismissive gesture of his hands, told Delgado to leave him alone. Delgado reacted by punching Hernandez in the face. The force of the blow broke Hernandez's sunglasses and fractured both walls of his left orbital region, forcing the eyeball back into its socket. (1RT 49:25-50:3, 54:7-27, 140-141.)

Adrian Padilla, also an employee at the Wyndham hotel, testified that when he saw Delgado angrily confront Hernandez about a traffic incident, he took up a position near Hernandez and Delgado "just in case" there was a fight. Padilla testified Hernandez's hands were on the steering wheel during the confrontation, and Hernandez never moved his hands out of sight nor reached for anything inside his car. Padilla stated that Delgado punched Hernandez in the face with his right fist and with "no warning," apparently in angry reaction to Hernandez's dismissive gesture.

Padilla also testified that Delgado walked away after he punched Hernandez. As Delgado was leaving, Padilla asked him, "Why [did you] hit him?" Delgado responded, "Because he deserved it." Delgado then drove away in his own car.

Hernandez was taken to the hospital, where he underwent surgery and remained for several days. Hernandez testified he suffered a lot of pain and could not open his left eye for a week or more. At the time of trial, he still suffered effects of the attack, including a lot of pain and dizziness.

B. The Defense

Delgado testified in his own behalf. He claimed this was not the first time Hernandez had cut him off in traffic, and he had heard that Hernandez was "aggressive." Delgado denied he was angry with Hernandez when he confronted him in the parking lot and testified he was merely concerned for his own safety and the safety of his children, who were in the car with him when Hernandez cut him off.

DISCUSSION

I. UNLAWFUL DOUBLE CONVICTION

Delgado first contends, and the Attorney General acknowledges, that his count 2 conviction of misdemeanor simple assault must be reversed because simple assault is a lesser included offense of his count 1 offense—battery causing serious bodily injury—and he cannot lawfully be convicted of both offenses. We agree.

"When a defendant is found guilty of both a greater and a necessarily lesser included offense arising out of the same act or course of conduct, and the evidence supports the verdict on the greater offense, that conviction is controlling, and the

conviction of the lesser offense must be reversed." (*People v. Sanders* (2012) 55 Cal.4th 731, 736 (*Sanders*).)

"A defendant who commits a battery may not be convicted of both battery and assault, because '[a]n assault is a necessary element of battery, and it is impossible to commit battery without assaulting the victim.'" (*People v. Ortega* (1998) 19 Cal.4th 686, 692 (*Ortega*), disapproved on another ground in *People v. Reed* (2006) 38 Cal.4th 1224; see *People v. Lopez* (1975) 47 Cal.App.3d 8, 15 (*Lopez*) ["Assault is a necessarily included offense in battery and the jury should have been instructed that it could convict [the defendant] of either of the two offenses charged, but not both."].)

Here, Delgado was found guilty of both the count 1 greater offense of battery causing serious bodily injury and the lesser necessarily-included count 2 offense of simple assault, and it is undisputed that both convictions arose out of the same act or course of conduct. Because Delgado does not challenge the sufficiency of the evidence to support his conviction of count 1, it is undisputed the evidence supports his conviction of that greater offense. Accordingly, we conclude Delgado's count 2 conviction of simple assault (and the concurrent time-served sentence imposed for that conviction) must be reversed because he cannot lawfully be convicted of both offenses.⁴ (See *Sanders*, *supra*, 55 Cal.4th at p. 736; *Ortega*, *supra*, 19 Cal.4th at p. 692; *Lopez*, *supra*, 47 Cal.App.3d at p. 15.)

⁴ In light of our conclusion, we need not address Delgado's alternative claim that the court should have stayed under section 654 the execution of the concurrent time-served sentence it imposed for his count 2 assault conviction.

II. \$1,800 VICTIM RESTITUTION FINE (§ 1202.4(b))

Delgado also contends that, because his count 2 misdemeanor simple assault conviction must be reversed, the \$1,800 restitution fine the court imposed under section 1202.4(b) is "excessive" and must be reduced by half to \$900, or the matter should be remanded for "a further sentencing hearing for the court to either reduce the fine or articulate reasons for not doing so" because "the fine was presumably based on two convictions and not one." Conceding that "he did not object [in the superior court] to the imposition of the restitution fine," Delgado further contends that if this court concludes he forfeited his claim that the restitution fine is excessive, his trial counsel prejudicially provided ineffective assistance by not objecting to the restitution fine the court imposed.

In response, the Attorney General argues that "[b]y failing to object to the restitution fine in the trial court, [Delgado] forfeited any appellate challenge to the fine." The Attorney General also asserts that "[i]f this court chooses to consider the claim notwithstanding the forfeiture doctrine, the matter should be remanded to the trial court to impose a restitution fine that court deems appropriate."

We conclude Delgado forfeited his claim that the \$1,800 restitution fine imposed under section 1202.4(b) is excessive, and his trial counsel did not provide ineffective assistance.

A. *Background*

In his report, the probation officer recommended that the court order Delgado to pay a "[r]estitution fine pursuant to [section] 1202.4(b) in the amount of \$1,800." At the sentencing hearing, without explanation or an objection from the defense, the court

ordered that Delgado "is to pay a restitution fine pursuant to [section] 1202.4(b) in the amount of \$1800."

B. *Analysis*

Where the probation report recommends the imposition of a restitution fine in a particular amount and cites the statutory authority for the fine, a defendant who fails to object when the trial court imposes that fine forfeits the objection for appeal. (*People v. Gillard* (1997) 57 Cal.App.4th 136, 165, fn. 18 (*Gillard*); *People v. Menius* (1994) 25 Cal.App.4th 1290, 1299 (*Menius*); *People v. Foster* (1993) 14 Cal.App.4th 939, 943-944 (*Foster*), superseded by statute on other grounds as noted in *People v. Sexton* (1995) 33 Cal.App.4th 64, 70.)

Here, as noted, the probation officer's report recommended that the court order Delgado to pay a restitution fine under section 1202.4(b) in the amount of \$1,800, thereby placing Delgado on notice of both the statutory basis for, and the amount of, the fine, which the court imposed at sentencing. By failing to object to the fine at the time of sentencing, Delgado forfeited his claim challenging on appeal the imposition of the \$1,800 restitution fine. (*Gillard, supra*, 57 Cal.App.4th at p. 165, fn. 18; *Menius, supra*, 25 Cal.App.4th at p. 1299; *Foster, supra*, 14 Cal.App.4th at pp. 943-944.)

We reject Delgado's related ineffective assistance of counsel claim. To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced the defendant.

(*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Ledesma* (1987) 43

Cal.3d 171, 216-217.) To show prejudice, the defendant must show a reasonable probability he would have received a more favorable result had his counsel's performance not been deficient. (*Strickland*, at p. 694; *Ledesma*, at pp. 217-218.) "He must also show that counsel had no informed tactical reason for the challenged act or omission." (*Foster*, *supra*, 14 Cal.App.4th at p. 944, citing *People v. Lewis* (1990) 50 Cal.3d 262, 288.)

Here, the record is silent as to why Delgado's defense counsel did not object to the \$1,800 restitution fine Delgado now challenges on appeal. Delgado has not shown, and cannot demonstrate, that his counsel had no informed tactical reason for not objecting to the restitution fine in question. We conclude Delgado's counsel had a reasonable tactical basis for his not doing so. As noted, the court imposed the fine under section 1202.4(b). Subdivision (b)(1) of that section expressly authorized the court to set the amount of the fine "at the discretion of the court and commensurate with the seriousness of the offense" in an amount "not more than [\$10,000]." Here, the evidence shows Delgado approached the open driver's side window of Hernandez's car and, with no warning or provocation, punched Hernandez, who was wearing his seat belt and whose hands were visible to Delgado, causing Hernandez to suffer severe injuries. The \$1,800 fine the court imposed was far below the statutory maximum, and it was very lenient in light of the seriousness of the crime Delgado committed. Under these circumstances, a competent defense attorney reasonably could have decided that the amount of the fine did not warrant an objection. Accordingly, we affirm the court's imposition of the fine.

DISPOSITION

Delgado's count 2 conviction of misdemeanor simple assault and the concurrent time-served sentence (288 days) imposed for that conviction are reversed. In all other respects, the judgment is affirmed. The matter is remanded to the superior court with directions that the clerk prepare an amended abstract of judgment to reflect these modifications to the judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

PRAGER, J.*

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.